SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 835

J. A. ZACHARIASSEN & CO.,

vs. *Petitioners,*

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion Below.

The opinion of the Court of Claims is not yet reported, but appears at pp. 30 to 36 of the record.

Jurisdiction.

The suit herein was instituted under a Special Act of Congress (49 Stat. 2368), the last sentence of which confers jurisdiction on this Court, on the petition of either party, to grant a writ of certiorari to the Court of Claims to review any determination rendered by the Court of Claims (R. 3).

Statement of Facts.

The facts have been sufficiently stated in the petition, but will be referred to from time to time in this brief.

ARGUMENT.

The grounds upon which the Court of Claims based its decision dismissing the action are set forth in its Special Finding of Fact No. 16, followed by its conclusion that those facts made the detention lawful. Special Finding of Fact No. 16 reads as follows:

> "16. The conditions and circumstances which formed the basis of the failure of the War Trade Board to grant licenses for necessary ship's stores and supplies, without which supplies the ships could not sail and without which licenses the ships could not obtain clearance, were (a) the probability of the vessels proceeding through the war danger zone, and, due to their speed, their possible seizure by enemy craft and the appropriation of the cargoes and stores for enemy purposes; (b) the uncertainty of the political situation in Russia and Finland, and (c) the character and responsibility of the officers and crews of the vessels" (R. 27).

(A.)

1. The finding numbered "(a)" that one of the reasons for the detention of the ship by the withholding of a bunker license because of the probability of the vessel's proceeding through the war danger zone, is without any evidence to support it.

The only testimony in the record on the point (Edgett, R. 59) is that no such objection was ever raised during the period of detention.

The only reasons stated in the contemporary correspondence and documents in evidence, including inter-office memoranda of the War Trade Board and the Shipping Board (R. 117-163, 179-219) are (1) the suspicions against the crews of the vessels and doubt as to the propriety of allowing the vessels to sail with those crews aboard, and (2) the uncertainty of the political situation then existing in Russia and Finland.

The Court's finding is inconsistent with the official action of the Shipping Board in approving the charter of the ALBYN (R. 119) which approval necessarily constituted an approval of the voyage which the vessel had to make in order to fulfill the terms of the charter. This action of the Shipping Board in approving the charter was taken pursuant to the provisions of the Shipping Act of 1917, as amended, under which the Shipping Board was authorized to approve or disapprove the charters, courses, voyages and trades in which vessels of different types might engage during the war period.

The Court's finding is contrary to every logical conclusion to be drawn from the fact that the Shipping Board offered to charter the vessel, and further offered to cause the vessel to carry out the charter which the owners had made for her with Vacuum Oil Company, which offer necessarily would cause the vessel to make the same voyage which she was prevented from making for over four months by the government's action in refusing a bunker license, and which voyage she did make as soon as she was released by the government.

It is contrary to every logical conclusion to be drawn from the fact established by the New York Custom House records (Plaintiffs' Ex. No. 15, R. 166-168). Those records, together with Plaintiffs' Ex. No. 18 (R. 172A) show that during the time the ALBYN was detained, 117 other sailing vessels, of other nationalities, were permitted to sail on voyages through the North Atlantic—the location of the war danger zones—similar to the voyage which the ALBYN proposed to make, which fact requires the conclusion that such voyages were not barred to sailing vessels by any government regulation.

Defendant's Exhibit No. 30 (R. 216) shows that the boundaries of the danger zone (fixed about one month after the ALBYN was detained, R. 185, 208-208A) were pur-

posely fixed so as not to interfere with the continued use of sailing vessels on these voyages:

In its Special Finding of Fact No. 8 the Court found:

> "During the period March 23 to July 31, 1918, the War Trade Board granted export cargo licenses and 'bunker' licenses to a number of vessels classed as sailing vessels under War Trade Board Regulations, but in those cases there were conditions, circumstances, and considerations with respect to the safety of the vessels, cargo, stores and supplies not present in the case of the ALBYN and other Finnish sailing vessels named in the jurisdictional act, upon the basis of which the War Trade Board decided to grant licenses upon which clearances were obtained" (R. 16).

Discussing the same subject in its opinion, the Court stated at page 29:

> "It is argued on behalf of plaintiff that the ship itself was the object of detention because other sailing vessels bound upon substantially similar voyages were granted licenses for cargoes and supplies, but we do not know the circumstances or reason which prompted the War Trade Board to grant those licenses" (R. 35).

The statement in the opinion is in accordance with the record. The statement in the Finding of Fact is without any evidence to support it. It was erroneously adopted from defendant's proposed Findings of Fact.

(B.)

1. In holding that the suspicions against the crew of the vessel constituted a defense to this claim, notwithstanding the fact that within one week from the date when an investigation thereof was ordered (near the end of the 130 day period of detention), the Bureau of Naval Intelligence established the fact that said suspicions were groundless,

the Court of Claims erroneously applied a rule which is applicable to Prize Cases, but which is not applicable to municipal seizures or detentions in port.

The rule applicable to the two classes of cases was stated by this Court in the early case of *The Apollon*, 9 Wheat. 362, as follows:

> "Some obscurity arose at the argument from not distinguishing between the effect of probable cause in cases of capture jure belli, and the effect in cases of municipal seizure. In respect to the former, no principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damage; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet further, and gives the captors their costs and expenses in proceeding to adjudication. But the case is far different in respect to municipal seizures. Probable cause has never been supposed to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal then he must respond in damages for the marine tort, unless he can shelter himself behind the protection of some statute."

The reason for the difference in the rules applicable to the two classes of cases is clear. In Prize Cases the captors are at sea; they must act promptly if their action is to be effective, and from the very nature of their situation, they must act, in most cases at least, solely upon suspicion. On the other hand, in the case of municipal seizures or detentions in port, the seizing or detaining officials have ample time and means to investigate their suspicions before making the arrest.

The rule applicable to cases involving municipal seizures or seizures in port, was applied in the following cases:

The Apollon, 9 Wheat. 362:
The Splendid, 4 Moore's Int. Arb. Cases, 3364;
The Labuan, 4 Moore's Int. Arb. Cases, 3721.

In the case of *The Apollon,* supra, the vessel was detained on suspicion that she was attempting to violate our local laws relating to entry and payment of entrance fees. Upon a failure to establish such intention, damages were awarded for the period of detention.

In the case of *The Labuan,* supra, the vessel loaded in New York for a Mexican port and was detained on suspicion that her crew, upon arrival in Mexico, might report to the Confederacy a large Union troop movement through New York. Upon a failure to establish such a probability, an award of damages for the period of detention was made by the Commission.

In distinguishing the facts in the *Labuan* case from the facts in the case of the *Zeelandia* (*Royal Holland Lloyd* v. *United States,* 73 Ct. Cls. 722), the Attorney General in his brief in the latter case (p. 203) approved the rule followed in the *Labuan* case in the following language:

> "Clearance was refused upon the mere suspicion that officers of the vessel might possibly reveal some military secrets to the Confederate forces. Manifestly there was no probable cause or reasonable ground for withholding clearance upon such a singular pretext and the Commission very properly awarded damages."

In the case of *The Splendid,* supra, the vessel was detained and later sold, on suspicion that she planned to land in Mexico articles barred by the laws of Mexico.

In awarding damages, the Claims Commission said:

> "The only reason assigned to justify the seizure of the vessel was the fact of finding on board the three boxes of soda powders, which it is alleged were prohibited by the laws of Mexico. * * * It is clearly proved that the soda powders were manifested for the United States, and that no attempt was made to introduce them into Mexico. Nothing occurred which could justify a suspicion of any intention to violate the laws of Mexico or to defraud the government. The seizure and sale of the vessel under these circumstances, upon the mere order of the judge was wholly unjustifiable and a gross violation of the laws of nations, for which the government of Mexico was justly responsible."

The Court of Claims cited no case which lays down a different rule, and we know of none. None of the cases cited by the Court of Claims in support of its decision herein has any applicability to the facts in this case, except *The Apollon,* supra, and it is an authority for petitioner's contention, not against it.

Under the terms of the Espionage Act, the President was authorized, upon the issuance of a proclamation declaring an emergency, to regulate the export of our products, and was further authorized to administer said act through such agent as he might designate. After the issuance of a proclamation declaring that an emergency existed, he issued a further order designating the War Trade Board as his agent to administer said act, which order authorized, among other things, the War Trade Board to make such rules and regulations "not inconsistent with law" as might be necessary and proper for the exercise of the powers conferred upon it (R. 182-183).

When the War Trade Board, on April 20, 1918, after the ALBYN had already been detained for practically a month,

adopted a resolution authorizing the refusal of a bunker license to vessels solely because of suspicions against the owners, masters or crews of vessels (R. 213), it exceeded the powers granted to it by the President under the aforesaid order, because such resolution was inconsistent with the law as expressed in the foregoing decisions.

2. The Court of Claims also overlooked the rule that, where there is unreasonable delay in proceedings relating to a detained ship, the detaining authorities are liable for damages therefor. It has found that the ALBYN was loading in New York from March 14th to March 22nd; was ready to sail on March 23rd, but was detained until July 24th (Special Finding of Fact No. 6, R. 6); that investigation of the suspicions of the crew was ordered on June 20th and completed on June 27th, the investigation resulting in a complete exoneration of the crew (Special Findings of Fact Nos. 13 and 14, R. 22-26). These findings demonstrate that the investigation, requiring only six days, could have been made and completed during the ten day period the ALBYN was loading and making ready to sail. If an expeditious investigation had been made, there would have been no detention or delay. The established delay or detention for 130 days is unconscionable and under such circumstances the rule is that damages are recoverable.

In the case of *United States* v. *Nuestra Senora Del Rigla*, 108 U. S. 92, a case prosecuted as a Prize Case but, in fact, a municipal seizure in port for government use, this Court said:

> "The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled."

In the case of *The Remonstrant*, 3 Prize Cases During the Great War, 14, the British Privy Council said:

> "The damages for detention which were adjudged against him (the captor) were rightly given if the representative of the Crown had been guilty of undue delay, and this the learned Judge found to have been the case."

Petitioners are entitled to the benefit of this rule applied both by our own and English courts. The Court of Claims overlooked this rule or erroneously considered it inapplicable.

(C.)

The Court of Claims erred also, in holding that the uncertainty of the political situation in Russia and Finland justified the detention of the ALBYN.

Just what it was in the political situation in Russia and Finland which made it appear unsafe or unwise to our government to allow the ALBYN to sail to South Africa does not appear from any contemporary document in evidence and no explanatory evidence thereon was offered at the trial. But if it be assumed that our government feared the worst and feared that Russia, or Finland, or both, might join our enemies, this would not constitute a defense to this claim under the only known decision in point.

The only known case in point is that of *The Caroline*, 4 Moore's Int. Arb. Cas. 3665. That was a case sponsored by this government against Mexico. The *Caroline* loaded in Mexico for a United States port as the war between the two countries appeared imminent. She was refused clearance for that reason and was detained until after the port where she was detained was captured by American troops in the war which followed shortly. After the

close of the war a claim for damages for the detention was sponsored by the United States, and an award therefor was made by the Arbitrator on the ground that,

> "At the time of the seizure of the vessel in the manner stated, war had not commenced between the two countries and the proceedings complained of cannot be justified on the ground of a belligerent right of Mexico."

In *The Caroline* case, war actually followed the detention within a few days. In this case war did not follow.

(D.)

The cases cited by the Court of Claims in support of its decision are not applicable to this case.

The point upon which the Court of Claims cited its decision in the case of *Royal Holland Lloyd* v. *United States*, 73 Ct. Cls. 722, as authority for its decision herein, i. e., that while an application for a bunker license was pending the detention was not unlawful, was neither litigated nor decided in that case.

In the *Kronprins Gustaf Adolf* and *Pacific* arbitration cases, Dept. of State Arbitration Series No. 5 (6), the Arbitrator found that the ships remained here because the owners were trying to obtain assurances from England that the vessels would be allowed to proceed without interference by England on some specific voyage and that because such assurances were never obtained, the vessels were never actually ready to leave an American port. No such situation exists in this case.

In the cases of *The Schooner Exchange* v. *McFadden*, 7 Cranch 116, *Cunard Steamship Co., Ltd.*, v. *Mellon*, 262 U. S. 100 and *Hamburg American Steam Packet Co.* v. *United States*, 250 Fed. 470, the plaintiffs in each case were attempting to evade or had violated our local laws

applicable to all ships entering our ports. No such facts exist in this case.

The Olinde Rodrigues, 174 U. S. 510, and *The Thompson,* 3 Wall. 155, were prize cases. As pointed out in "(B)", reasonable grounds for suspicion is a defense in such cases, but is not a defense in cases of municipal seizures or detentions in port.

In the case of *United States* v. *Diekelman,* 92 U. S. 520, the ship was attempting to take out enemy goods, the export of which was absolutely prohibited. The vessel was notified of the specific reason for the detention; was notified that if the banned goods were removed clearance would be granted, and when the banned goods finally were removed, clearance was granted. Claim for damages for the period prior to removal of the banned goods was properly denied under such circumstances. But no such situation exists in this case.

The case of *The Apollon,* 9 Wheat. 362, is an authority for petitioners' claim, not against it. The *Apollon* was arrested and detained on suspicion of attempting to violate our local laws. Upon the trial the proof established the fact that the suspicions were groundless and damages were awarded.

(E.)

In addition to the errors discussed above, petitioners claim that there has been error in the Court's computation of damages and in disallowing interest on the damages suffered. Those two points become material, however, only in the event that the Court should find that the detention of the ship was unlawful. For that reason the points will not be argued in this brief.

(F.)

There is nothing in the rules contended for here which will hamper or restrict the government's effort in meeting the present emergency.

Under the right of angary this nation in such an emergency may detain, take or use the property of individuals of neutral nations upon the sole condition that it pay reasonable compensation therefor.

Oppenheim, International Law, Vol. 11, Sec. 365;
Borchard, Diplomatic Relations, p. 266.

It may take on suspicion ships and cargoes as prizes of war subject only to the rule that if it fails to establish the fact that they are enemy owned or enemy bound, they must be returned and to the further rule that if it fails to establish reasonable grounds for suspicion then it must pay reasonable compensation for the detention.

The Apollon, supra.

Without creating a cause for war, it may detain in ports ships suspected of an intention to aid the enemy, but upon failure to establish its suspicions as well founded in fact, then it must pay reasonable compensation therefor.

The Labuan, supra.

It has been reported in the press since our declaration of war, that the seizure of 19 Finnish vessels now in the ports of this country was in accord with the principles above set forth; that is, that this Government would pay just compensation for the ships so seized. And the same rule was invoked in the earlier seizure of numerous other foreign ships of non-belligerent nations.

While it is true that certain nations today are showing a complete disregard of all known rules of international law, order and justice, it is likewise true that this nation has always rejected such practices and has always insisted that even war must be conducted according to established rules of International Law and order, especially in so far as the interests and rights of neutrals are concerned. The reason that this nation has steadfastly urged this rule is because,

as a nation, we detest the philosophy of international law breakers, and because we feel deeply that nations, and the peoples thereof, can live decently and in peace only under equitable rules of international law and order.

So in this case plaintiffs are only asking that these long-established rules of both local and international law be applied to their claims; rules which this country itself has long championed and defended; rules which are based solely on equitable principles of fair dealing and reasonable conduct, and which are still in full force and effect.

Conclusion.

It is respectfully submitted that for the reasons set forth in the petition, this case is one calling for the exercise by this Court of its supervisory powers in order that a final determination may be had and that to such end a writ of certiorari should be granted, and that this Court should review the decision of the Court of Claims, order that its decision be reversed and direct such further proceeding as justice requires.

New York, January 3, 1942.

Respectfully submitted,

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